FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. [redacted] 86

W. C. ALLRED; CHARLES B. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. P. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT AND MRS. E. P. THOMPSON, PARTNERS TRADING AS BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM B. GRIFFIN, SALLIE M. WISE AND FRANK V. MERRITT, PARTNERS TRADING AS CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS AND E. L. HARRIS, TRADING AS J. O. AND E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVES; RITZ, INC., THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED AND SIDNEY WHARTON;

Appellants

against

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1355

W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as BEACH AND BEACH, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*,

STATEMENT BY THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS OF THEIR GROUNDS OF OPPOSITION TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF THE APPEAL OF W. C. ALLRED, ET AL.

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Supreme Court of the United States

OCTOBER TERM, 1946

W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as BEACH AND BEACH, *et al.*, *Appellants*, vs. THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*,	No. 1355

STATEMENT BY THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS OF THEIR GROUNDS OF OPPOSITION TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF THE APPEAL OF W. C. ALLRED, ET AL.

The Twentieth Century-Fox, Loew's, RKO, Paramount and Warner defendants-respondents move pursuant to the Rules of the Supreme Court of the United States for an order dismissing the attempted appeal of W. C. Allred *et al.* herein with costs. In support of such motion, these defendants present this counter statement as to the jurisdiction of this Court asserted by the appellants in their Statement of Jurisdiction filed and served February 26, 1947.

The attempted appeal is from an order denying the appellants leave to intervene in a suit brought by the United States against Paramount Pictures *et al.* to enjoin alleged

violations of the anti-trust laws (15 U. S. C. Sections 1 et seq.). Intervention was not only opposed by the defendants, but also by the plaintiff upon the ground that the effect of making the appellants parties, as plaintiff's counsel stated, "* * * would simply be to hopelessly confuse the litigation without in any way aiding the solution that the Court has to arrive at".

1. THE JURISDICTIONAL STATEMENT DOES NOT SUSTAIN THE ATTEMPTED APPEAL.

This Court has consistently held that it lacks jurisdiction of an appeal from an order which does not possess the finality required by the statutes regulating its appellate jurisdiction.

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
United States v. *California Cooperative Canners*, 279 U. S. 533, 556;
Arnold v. *Guimarin & Co.*, 263 U. S. 427;
Collins v. *Miller*, 252 U. S. 364.

The statute relied upon by the appellants herein to sustain the appellate jurisdiction of the Supreme Court, namely, 15 U. S. C. Section 29, (32 Stat. 823), is not applicable to their appeal for the reason that the order sought to be appealed from is not a final decree as required by that statute.

Since it appears from the jurisdictional statement that the order in question is not a final decree, this Court should dismiss the appeal summarily for want of jurisdiction. In this very suit this Court has already dismissed a previous attempted appeal by several unsuccessful applicants for leave to intervene:

St. Louis Amusement Co. et al. v. *United States*, 326 U. S. 680.

In so doing, the court followed its established rule in such cases:

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
Jewel Incandescent Lamp Co. Inc. v. *General Electric Company*, 318 U. S. 746;
Mississippi Central Railroad Co. v. *Smith*, 295 U. S. 718;
Hinderlider v. *La Platta River & Cherry Creek Ditch Co.*, 291 U. S. 650.

The cases cited by the appellants do not support their contention that this Court has jurisdiction of their appeal. *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194, did not concern an appeal from an order of the District Court denying leave to intervene, but was an original motion in the Supreme Court for leave to intervene. The appeal by the intervenors in the *Terminal* case appears *sub nom Evans and Howard Fire Brick Co.* v. *United States*, 236 U. S. 210. The questions of appealability and of jurisdiction were not raised and the order denying intervention was affirmed, since the relief that the intervenors sought had been accomplished by the Supreme Court decision in the main suit upon the appeal of the St. Louis Terminal Co. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, does not support the contention of the appellants, since there the intervenor was named in the decree which expressly provided that if action were taken affecting the intervenor's rights it should be permitted to be heard, as Mr. Justice Roberts pointed out in *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, at 141.

Neither *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, nor *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, cited by appellants W. C. Allred, *et al.*, as sup-

porting their right to appeal have any application, since they did not involve motions for leave to intervene, but were simply ordinary cases under the Expediting Act where the parties to the actions appealed directly to the Supreme Court from final decrees entered by the District Court.

2. THE ORDER IS NOT APPEALABLE.

An order denying leave to intervene is not appealable, at least unless the applicant for intervention has a direct and immediate legal interest in a *res* which is the subject of the suit and which will be lost if intervention is denied.

United States v. *California Cooperative Canners*, 279 U. S. 553, 556;
Credits Commutation Co. v. *U. S.*, 177 U. S. 131;
Ex-Parte Leaf Tobacco Board of Trade, 222 U. S. 578;
In re Englehard & Sons Co., 231 U. S. 646;
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;
City of New York v. *New York Telephone Co.*, 261 U. S. 312.

The appellants in this case, W. C. Allred, et al., have no such interest in the subject matter of the present suit.

Furthermore, in the case at bar, it is clear beyond question that the appellants do not have any legal interest in this litigation which is affected by the judgment herein. In other words, if one or more of the defendants had happened to distribute their motion pictures in the manner that is now required by the judgment, none of the appellants would have been possessed of the legal right to compel such defendants to sell in any other manner. The

mere fact that the judgment directs the defendants to sell in this manner does not provide the appellants with any status to complain.

The order denying leave to intervene did not finally determine any right or claim which these appellants may possess. Their right, if any, to institute independent suits to enforce whatever rights they may possess is not affected by the order sought to be appealed from (15 U. S. C. Section 15).

3. APPELLANTS WERE NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT NOR AS A MATTER OF DISCRETION. REFUSAL OF LEAVE WAS CORRECT AND NOT AN ABUSE OF DISCRETION.

Appellants seeks to bring themselves within subdivision (2) of paragraph (a) of Rule 24, Federal Rules of Civil Procedure, which permits intervention of right "when the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Under this rule both inadequacy of representation and the fact that the applicant will be bound by the judgment must appear. See *MacDonald* v. *U. S.*, 119 F. (2d), 821, 827 (C. C. A. 9th, 1941), modified on other grounds, 315 U. S. 262.

Appellants are not "inadequately represented" within the meaning of Rule 24. *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137. That rule applies to representative action such as class actions, stockholders' derivative suits, etc. *United States* v. *Columbia Gas & Electric Corporation*, 27 F. Supp. 116; app. dism. 108 F. (2d), 614; cert. den. 309 U. S. 687; 2 *Moore Federal Practice* (1938 Sec. 24.07).

These appellants are therefore not entitled to intervene as a matter of right. Nor do they come within the provi-

sions of the Rule permitting intervention as a matter of discretion.

Paragraph (b), Subdivision 2, of Rule 24 permits the District Court to allow intervention as a matter of discretion "when an applicant's claim or defense and the main action have a question of law or of fact in common." It further provides that "in exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The appellants have no claim or defense having questions of law or fact in common with the main action. And it is apparent that to permit the intervention might unduly delay or prejudice the adjudication of the rights of the original parties. There was ample ground for the denial of intervention as a matter of discretion and the exercise of that discretion may not be reviewed in the absence of clear abuse.

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
Credits Commutation Co. v. *United States*, 177 U. S. 311.

It is therefore respectfully submitted that this Court is without jurisdiction thereof and that this appeal should be dismissed summarily.

WHEREFORE, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (sued herein as Vitagraph, Inc.), Warner Bros. Circuit Management Corporation, Twentieth Century-Fox Film Corporation, and National Theatres Corporation move

pursuant to the Rules of the Supreme Court of the United States for an order dismissing the appeal of W. C. Allred, *et al.*, herein with costs.

Dated, New York, N. Y., March 13, 1947.

Respectfully submitted,

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